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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION III

1650 Arch Street

Philadelphia, Pennsylvania 19103-2029

REGIONAL HEARING CLERK
EPA REGION III, PHILA. PA

In the Matter of:

ADMINISTRATIVE ORDER
ON CONSENT

West Virginia Department of Transportation:

Division of Highways

1900 Kanawha Boulevard, East

Building 5, Room 148

Charleston, West Virginia 25305

Docket No. CWA-03-2016-0167DN

Respondent

I. STATUTORY AND REGULATORY AUTHORITY

1. EPA has made the following findings of fact and issues this Administrative Order on Consent (Consent Order) pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (EPA) under Section 309(a) of the Clean Water Act (CWA or Act), 33 U.S.C. § 1319(a). This authority has been delegated by the Administrator to the Regional Administrator of EPA Region III, and further delegated to the Director, Water Protection Division, Region III.
2. Section 309 of the Act, 33 U.S.C. § 1319(a), provides, *inter alia*, that whenever on the basis of any information available to him the Administrator finds that any person is in violation of any permit condition or limitation implementing certain CWA sections in a permit issued under Section 402 of the Act, 33 U.S.C. § 1342, he shall issue an Order requiring such person to comply with such section or requirement.
3. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant (other than dredged or fill material) from a point source into waters of the United States except in compliance with a permit issued pursuant to the

National Pollutant Discharge Elimination System (“NPDES”) program under Section 402 of the Act, 33 U.S.C. § 1342.

4. Section 402(a) of the Act, 33 U.S.C. § 1342(a), provides that the Administrator of EPA may issue permits under the NPDES program for the discharge of pollutants from point sources to waters of the United States. The discharges are subject to specific terms and conditions as prescribed in the permit.
5. Federal regulations promulgated pursuant to the CWA define the phrase “waters of the United States” to include, among other things, (i) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (ii) all interstate waters; (iii) all other waters such as intrastate lakes, rivers and streams, including intermittent streams, the use, degradation, or destruction of which would or could affect interstate commerce; (iv) tributaries of waters of the United States, and (v) all waters adjacent to these waters. 40 C.F.R. § 122.2.
6. “Pollutant” as defined at Section 502(6) of the CWA, 33 U.S.C. § 1362(6), and 40 C.F.R. § 122.2 means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials . . . heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.
7. “Discharge of a pollutant” includes “any addition of any pollutant or combination of pollutants to waters of the United States from any point source.” 40 C.F.R. § 122.2.
8. Section 502(5) of the CWA, 33 U.S.C. §1362(5), defines the term “person” as “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body”.
9. “Storm water” is defined as “storm water runoff, snow melt runoff and surface runoff and drainage.” 40 C.F.R. § 122.26(b)(13).
10. The term “municipal separate storm sewer system” (“MS4”) includes, “a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains) owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law)

having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States.” 40 C.F.R. § 122.26(b)(8)(i).

II. FINDINGS OF FACT, JURISDICTIONAL ALLEGATIONS AND CONCLUSIONS OF LAW

11. The West Virginia Department of Transportation, Division of Highways (“Respondent” or “DOH”) is a “person” within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).
12. Respondent owns, and operates an MS4 located throughout the State of West Virginia.
13. Pursuant to Section 402(b) of the Act, 33 U.S.C. § 1342(b), EPA authorized the State of West Virginia, through the West Virginia Department of Environmental Protection (“WVDEP”), to issue NPDES permits throughout West Virginia in 1982.
14. On June 22, 2009, WVDEP issued DOH a National Pollution Discharge Elimination System Permit, WV0116025, Stormwater Discharges from small Municipal Separate Storm Sewer Systems (the “MS4 Permit”), which regulates discharges from DOH’s MS4. The MS4 Permit had an effective date of July 22, 2009 and had an expiration date of July 22, 2014.
15. As part of its application for an MS4 permit, DOH submitted a site registration application for a Storm Water Management Program (the “SWMP”), which would be incorporated into the MS4 Permit once approved by WVDEP.
16. DOH’s SWMP was approved by WVDEP on November 9, 2012 and was incorporated into the MS4 Permit.
17. According to DOH’s SWMP, DOH maintained an MS4 area of approximately 167,000 acres across the State within the urban areas of Beckley, Charleston, Cumberland, Hagerstown, Morgantown, Parkersburg, Weirton and Wheeling.
18. Respondent’s MS4 discharges storm water to the Kanawha and Ohio Rivers and their respective watersheds. These are “waters of the United States” within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7) and 40 C.F.R. § 122.2.

19. From May 12 through 16, 2014 duly-authorized EPA representatives and their contractors conducted an inspection of Respondent's MS4 program ("the 2014 MS4 Inspection").
20. During the 2014 MS4 Inspection, EPA representatives identified a number of observations and violations of the 2009 Permit and the CWA as described below.
21. EPA prepared a report of the 2014 MS4 Inspection, dated August 22, 2014 ("the 2014 Inspection Report"). A copy of the 2014 Inspection Report was provided to the DOH via e-mail on December 23, 2015. DOH provided EPA with comments on the 2014 Inspection Report on February 19, 2016.
22. WVDOH staff explained that WVDOH's procedures include routine inspections of WVDOH construction sites as dictated by the nature of each project. Inspections are conducted by WVDOH staff and/or third parties or the general contractor in accordance with contract terms and as an agent of WVDOH. Further, WVDOH's response to the 2014 Inspection Report stated that "...we are implementing additional regular (a minimum of once a month) inspections to be performed by the District Environmental Coordinator for all WVDOH construction projects within our MS4 area" as a supplement to the procedures required by the permit.

Count I: Failure to Submit an Annual Stormwater Management Report

23. Part II.B.9 of the MS4 Permit requires, "An annual report prescribed in Part IV.D of this permit shall be submitted to DWWM [WVDEP Division of Water and Waste Management] each year on the anniversary of the SWMP approval."
24. At the time of inspection, DOH had not submitted an MS4 program annual stormwater management report to WVDEP. DOH's 2013 annual report was required to be submitted to WVDEP by November 9, 2013, one year after WVDEP's approval of the SWMP. The DOH MS4 Coordinator explained, at the time of the 2014 MS4 Inspection, that the 2013 report had not yet been submitted to WVDEP.
25. Respondent's failure to submit an annual stormwater management report is a violation of the MS4 Permit and Section 301 of the Act, 33 U.S.C. § 1311.

Count II: Failure to Update Post Construction Stormwater Best Management Practices Inventory

26. Part II.C.b.5.a.ii.D of the MS4 Permit requires DOH to develop a system designed to inventory and track storm water management practices deployed at new development and redevelopment projects. The database or tracking system shall include information on both public and private sector projects that are within the jurisdiction of the permittee. In addition to the standard information required for all projects, the tracking system shall also include: 1. source control stormwater management practices; 2. treatment control stormwater management practices; 3. latitude and longitude coordinates of stormwater BMP controls using a global positioning system; 4. digital photographs of stormwater management practice controls; 5. maintenance requirements of stormwater management practices; and 6. inspection information.
27. DOH staff explained that, prior to the onsite inspection, DOH maintained records regarding stormwater management practices deployed at each project location in the respective district office and maintained a central summary listing of all projects statewide. DOH provided the EPA Inspection Team with a Microsoft[®] Excel spreadsheet which included a summary list of 16 post-construction BMPs. The list identified the DOH district the BMPs were located in and provided a location either with county, latitude/longitude, and/or a narrative description. The summary list did not include some of the additional information which is required by Part II.C.b.5.a.ii.D. of the MS4 Permit. The list of 16 post construction BMPs had not been updated to include two DOH-owned post-construction BMPs the EPA Inspection Team visited in DOH District 4 during the 2014 MS4 Inspection.
28. Respondent's failure to inventory and track all of the required additional information for new development and redevelopment projects within the MS4 area is a violation of the MS4 Permit and Section 301 of the Act, 33 U.S.C. § 1311.

Count III: Failure to Develop Pollution Prevention and Good Housekeeping Procedures

29. Part II.C.b.6.b of the MS4 Permit requires the DOH to implement policies and procedures to reduce the discharge of pollutants in storm water runoff from all lands owned or maintained by DOH and subject to the MS4 Permit. These procedures are required to address pollution prevention and good housekeeping procedures for DOH maintenance operations.
30. During the 2014 MS4 Inspection, EPA visited five DOH facilities, made several observations regarding the municipal operations at the five facilities, and found deficiencies in DOH's implementation of pollution prevention and good housekeeping procedures at the five DOH facilities.
31. At the North Charleston Maintenance Facility in DOH District #1, an unlabeled rusting metal drum was left in outdoor area exposed to the elements and full waste dumpsters were left uncovered and their contents were exposed to the elements.
32. At the Cabell County Headquarters Maintenance Facility two 55-gallon drums of chemicals were stored outside a maintenance shed outside of secondary containment or overhead coverage with their bung caps removed, several small containers of fluid were stored on a pallet outside without coverage or containment, and filled dumpsters were left uncovered. WVDOH stated that all deficiencies in implementation were promptly rectified and additional training was employed to inhibit future deficiencies.
33. Respondent's failure to implement its pollution prevention and good housekeeping procedures at DOH maintenance operations is a violation of the MS4 Permit and Section 301 of the Act, 33 U.S.C. § 1311.

III. ORDER

AND NOW, this 31st day of August, 2016, pursuant to section 309(a) of the Act, 33 U.S.C. § 1319(a), having taken into account the seriousness of the violations and any good faith efforts by Respondent to comply with section 301(a) of the Act, Respondent is hereby ORDERED, pursuant to Section 309(a) to do the following within ninety days of the effective date of this Consent Order:

34. Respondent shall take all actions necessary to comply with its MS4 Permit, including:
 - a. Ensure that all required annual stormwater management reports are being submitted to WV DEP on an annual basis;

- b. Continue to implement the plan to supplement the permit inspection requirements by having DOH representatives (or third party contractors) conduct inspections of all construction sites;
- c. Continue to ensure that all non DOH fill disposal waste sites are identified in the construction project file, including the name and location of the owner of the fill disposal waste site, and ensure that all fill disposal waste sites have the appropriate permits to accept the fill disposal waste;
- d. Submit the current DOH database of all permanent post construction stormwater best management practices containing all information required in the permit; and
- e. Ensure implementation of pollution prevention and good housekeeping procedures at all DOH sites.

35. All documents required by Paragraph 34 of this Order shall be accompanied by a certification signed by a responsible municipal officer, as defined in 40 CFR § 122.22(d), that reads as follows:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Signed _____
Title _____

All documents required herein shall be submitted to:

Peter Gold
Enforcement Officer
NPDES Enforcement Branch
Mail Code (3WP42)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

IV. GENERAL PROVISIONS

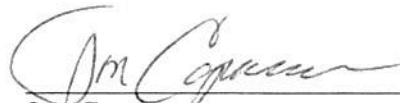
36. Issuance of this Consent Order is intended to address the violations described herein. EPA reserves the right to commence action against any person, including Respondent, in response to any condition which EPA determines may present an imminent and substantial endangerment to the public health, public welfare, or the environment. Further, EPA reserves any existing rights and remedies available to it under the CWA, 33 U.S.C. §1311, et seq., the regulations promulgated thereunder, and any other federal laws or regulations for which EPA has jurisdiction. Further, EPA reserves any rights and remedies available to it under the CWA, the regulations promulgated thereunder, and any other federal laws or regulations for which EPA has jurisdiction, to enforce the provisions of this Consent Order, following its effective date (as defined below).
37. This Consent Order does not constitute a waiver or modification of the terms or conditions of Respondent's MS4 Permit. Compliance with the terms and conditions of this Consent Order does not relieve Respondent of its obligations to comply with any applicable federal, state, or local law or regulation.
38. For the purposes of this proceeding, Respondent neither admits nor denies the factual allegations and conclusions of law set forth in this Consent Order.
39. Respondent waives any and all remedies, claims for relief and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this Consent Order, including any right of judicial review pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.
40. By entering into this Consent Order, Respondent does not admit any liability for the civil claims alleged herein.

V. EFFECTIVE DATE

This ORDER is effective after receipt by Respondent of a fully executed document.

SO ORDERED:

Date: 8-31-16


Jon Capacasa
Director, Water Protection Division
U.S. EPA Region III

AGREED TO:

For the West Virginia Department of
Transportation, Division of Highways:

Date: 8-12-2016


Gregory L. Bailey, P.E.
State Highway Engineer

West Virginia Department of Transportation
Docket No. CWA-03-2016-0167DN

CERTIFICATE OF SERVICE

I certify that on this date I caused to be sent by certified mail, return receipt requested, a copy of this "Administrative Order on Consent" to the following persons:

Gregory L. Bailey, P.E.
State Highway Engineer
Division of Highways
West Virginia Department of Transportation
1900 Kanawha Boulevard, East
Building 5, Room 148
State Capitol Complex
Charleston, West Virginia 25305

And the original and a copy delivered by hand to:

Regional Hearing Clerk (3RC00)
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Additionally, I caused to be sent by first class mail a copy of this "Administrative Order on Consent" to the following persons:

Jeremy Brandy, Program Administrator
Division of Water and Waste management-Environmental Enforcement
West Virginia Department of Environmental Protection
601 57th Street, S.E.
Charleston, West Virginia 25304

Peter Gold
U.S. EPA Region III

Date: August 31, 2016


Robert J. Smolski
Senior Assistant Regional Counsel